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# THE UPC SUBSTITUTED JUDGMENT/BEST INTEREST STANDARD FOR GUARDIAN DECISIONS: A PROPOSAL FOR REFORM<sup>†</sup>

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*The introduction in 1997 of “substituted judgment” as a guiding principle for guardian decisions was a key contribution of the UPC to guardianship reform. The current UPC Section 5-314(a) instructs guardians to “consider the expressed desires and personal values of the ward” when making decisions and to “at all times . . . act in the ward’s best interest.” This dual mandate for guardian decisions was intended to promote the self-determination interests of incapacitated adults. This Article argues that in practice the standard has failed to achieve this goal. It analyzes the shortcomings of UPC Section 5-314(a) and other statutory decision-making standards and offers an improved decision-making model. Frolik and Whitton propose reform of Section 5-314(a) to provide better guidance for guardians, and to harmonize the standard for guardian decisions with other surrogate decision-making standards within the UPC.*

## INTRODUCTION

The 1997 Uniform Guardianship and Protective Proceedings Act (UGPPA)<sup>1</sup> introduced to the Uniform Probate Code (UPC)<sup>2</sup> the concept of substituted judgment as a guiding principle for guardian decisions. The 1997 UGPPA mandates that “[a] guardian, in making decisions, shall consider the expressed desires and

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1. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314 cmt. (1997), 8A U.L.A. 370 (2003) (“Although the guardian only need consider the ward’s desires and values to the extent known to the guardian, that phrase should not be read as an ‘out’ for the guardian. Instead, the guardian must make an effort to learn the ward’s personal values and ask the ward about the ward’s desires before the guardian makes a decision. When the guardian is making decisions for the ward, the guardian, wherever possible, should use the substitute decision-making standard . . . in reaching a decision, making the decision the ward would make, if competent to do so.”). Other significant contributions of the 1997 UGPPA include the concepts of limited guardian and limited conservator, and the importance of functional assessment in determining incapacity. See § 102 cmt., 8A U.L.A. at 313–14.

2. The UGPPA comprises Article 5, Parts 3 & 4 of the Uniform Probate Code.

personal values of the ward to the extent known to the guardian.”<sup>3</sup> This emphasis on the unique wishes and views of the ward significantly differs from the 1982 UGPPA and the original 1969 UPC, both of which treated guardianship of incapacitated adults the same as that of minors.<sup>4</sup> Prior to the 1997 UGPPA, judges viewed adult guardianship primarily as a protective arrangement,<sup>5</sup> with a guardian expected to do what was “best” for an incapacitated adult, much as if the guardian were a parent.<sup>6</sup>

The new “substituted judgment” language in the UPC signaled a paradigm shift. By requiring guardians to consider what the incapacitated person would want, the UPC focus for adult guardianship became broader than mere protection—it came to include recognition of an adult’s self-determination interests.<sup>7</sup> This shift reflected a growing emphasis in the 1980s on the rights of incapacitated adults.<sup>8</sup>

The 1997 UGPPA did not, however, reject the beneficent *parens patriae* model for adult guardianship. Section 314(a) of the Act also requires that “[a] guardian *at all times* shall act in the ward’s best interest.”<sup>9</sup> Section 314(a) in its entirety provides:

Except as otherwise limited by the court, a guardian shall make decisions regarding the ward’s support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward’s limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward’s own behalf, and develop or regain the ca-

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3. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314(a) (1997), 8A U.L.A. 369 (2003).

4. See § 314 cmt., 8A U.L.A. 370 (“Under Section 2-209 of the 1982 Act (U.P.C. Section 5-309 (1982)), the guardian of an incapacitated person was simply granted the powers of guardian of a minor, provisions of which were located in the counterpart provisions in Article 2 (Part 2 of Article 5).”); UNIF. PROBATE CODE § 5-312(a) (1969) (amended 2011) (giving the guardian of an incapacitated adult “the same powers, rights and duties respecting his ward that a parent has respecting his unemancipated minor child”).

5. See Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 601–03 (1981).

6. See Michael Casasanto et al., *A Model Code of Ethics for Guardians*, 11 WHITTIER L. REV. 543, 547 (1989) (observing that the best interest standard embodies “the view that the guardian’s duties are akin to those imposed on a parent”).

7. See *supra* note 1. For a discussion of how the doctrine of substituted judgment promotes individual autonomy and self-determination, see RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 224 (1993).

8. See generally ABA COMM’N ON THE MENTALLY DISABLED & ABA COMM’N ON LEGAL PROBLEMS OF THE ELDERLY, *GUARDIANSHIP: AN AGENDA FOR REFORM* (1989).

9. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314(a) (1997), 8A U.L.A. 369 (2003) (emphasis added).

*capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.*<sup>10</sup>

Thus, a guardian operating under the decision-making standard of the 1997 Act has a dual mandate—to consider the incapacitated adult's expressed desires and personal values *and* to act at all times in that person's best interest.<sup>11</sup>

While this UPC “dual mandate” for guardian decisions was, in theory, a step forward in protecting the self-determination interests of incapacitated adults, we will make the argument that, in practice, the standard has fallen short of intended law reform goals. As a foundation for this argument, we first assess how many jurisdictions have adopted statutory language that can be construed as requiring guardians to use some form of substituted judgment. This assessment will show that only slightly more than one-third of American jurisdictions have statutory decision-making standards that include substituted judgment, and that nearly all such statutes fail to provide guidance about how to use substituted judgment and best interest when making surrogate decisions. We then offer a surrogate decision-making model that illustrates how substituted judgment and best interest can be used across a continuum to maximize the self-determination interests of incapacitated adults. This model synthesizes the various theories about the meaning of substituted judgment and best interest and addresses the practical challenges of implementing those concepts in surrogate decisions. Finally, we propose a revision to Section 314(a) of the 1997 UGPPA. The purpose of this proposal is two-fold: first, to provide better guidance to guardians, and second, to harmonize the surrogate decision-making standard of the UGPPA with those of the Uniform Health-Care Decisions Act<sup>12</sup> and the Uniform Power of Attorney Act.<sup>13</sup>

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10. *Id.* (emphasis added).

11. *Id.*

12. *See* UNIF. HEALTH-CARE DECISIONS ACT (1994), 9 U.L.A. pt. IB, at 88 (2005) (containing three surrogate decision-making standards: section 2(e) (health-care agents), section 5(f) (surrogates for persons without a health-care agent or guardian), and section 6(a) (guardians)).

13. *See* UNIF. POWER OF ATTORNEY ACT § 114(a) (2006), 8B U.L.A. 78 (Supp. 2011) (providing the surrogate decision-making standard for agents).

## I. STATUTORY GUARDIANSHIP DECISION-MAKING STANDARDS

In preparation for the recent third National Guardianship Summit,<sup>14</sup> we reviewed all adult guardianship statutes to determine how many contain general decision-making standards and whether those standards emphasize substituted judgment, best interest, or both.<sup>15</sup> We excluded from our examination statutory provisions specific to health-care decision-making and focused instead on decision-making standards for all other types of guardian decisions. We found that twenty-eight jurisdictions, a majority of the fifty-two reviewed, have no articulated decision-making standard for the guardians of incapacitated adults.<sup>16</sup> Six states have guardianship

14. The Third National Guardianship Summit, "Standards of Excellence," was held at the University of Utah S.J. Quinney College of Law in Salt Lake City, Utah on October 12–15, 2011. See GUARDIANSHIP SUMMIT 2011, <http://www.guardianshipsummit.org> (last visited Feb. 24, 2012) (Summit website). The first such Summit was the National Guardianship Symposium, held in 1988 in Racine, Wisconsin (known as the "Wingspread Symposium" after the Johnson Foundation Wingspread Conference Center where the conference was held). In 2001, the Second National Guardianship Conference, "Wingspan," was held at Stetson University College of Law, Tampa Bay, Florida. See *Summit History*, GUARDIANSHIP SUMMIT 2011, <http://www.guardianshipsummit.org/summit-history> (last visited Feb. 24, 2012).

15. See Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, UTAH L. REV. (forthcoming 2012).

16. See ALA. CODE §§ 26-2-2 to -55, 26-2A-1 to -160, 26-3-1 to -14, 26-5-1 to -54, 26-8-1 to -52, 26-9-1 to -5 and -7 to -19 (LexisNexis 2009); ALASKA STAT. §§ 13.26.001–.410 (2010); ARK. CODE ANN. §§ 28-65-101 to -603; 28-66-101 to -124; 28-67-101 to -111 (2004); CAL. PROB. CODE §§ 1400–1490, 1500–1611, 1800–1970, 2100–2893 (West 2002 & Supp. 2012); DEL. CODE ANN. tit. 12, §§ 3901–3997 (2007 & Supp. 2010); FLA. STAT. ANN. §§ 744.101–.715, 747.01–.052 (West 2010 & Supp. 2012); IDAHO CODE ANN. §§ 15-5-101 to -603 (2009 & Supp. 2011); IND. CODE ANN. §§ 29-3-1-1 to -13-3 (West 2010); IOWA CODE ANN. §§ 633.551–.682 (West 2003 & Supp. 2011); KY. REV. STAT. ANN. §§ 387.010–.990 (LexisNexis 2010); LA. CODE CIV. PROCEEDINGS ANN. art. 4542–4569 (1998 & Supp. 2011) and LA. REV. STAT. ANN. §§ 9:1021 to :1034 (2008); ME. REV. STAT. ANN. tit. 18-A, §§ 5-101 to -105, 5-301 to -432 (1998 & Supp. 2011); MD. CODE ANN., EST. & TRUSTS §§ 13-101 to -222, 13-704 to -908 (LexisNexis 2011); MINN. STAT. ANN. §§ 524.5-101 to -502 (West 2002 & Supp. 2012); MISS. CODE ANN. §§ 93-13-1 to -281 (West 2007 & Supp. 2011); MONT. CODE ANN. §§ 72-5-101 to -638 (2011); NEB. REV. STAT. §§ 30-2601 to -2672 (2008); N.H. REV. STAT. ANN. §§ 464-A:1 to :47 (LexisNexis 2007 & Supp. 2010); N.M. STAT. ANN. §§ 45-5-101 to -617 (2004); N.D. CENT. CODE §§ 30.1-26-01 to -29-31 (2010); OKLA. STAT. ANN. tit. 30, §§ 1-101 to 4-904 (West 2009 & Supp. 2012); OR. REV. STAT. §§ 125.005–.650 (2011); S.C. CODE ANN. §§ 62-5-101 to -435 (2010 & Supp. 2010); TENN. CODE ANN. §§ 34-1-101 to 34-3-109 (2007 & Supp. 2011); TEX. PROB. CODE ANN. §§ 601–916 (West 2003 & Supp. 2010); UTAH CODE ANN. §§ 75-5-101 to -433 (LexisNexis 1993 & Supp. 2010); VT. STAT. ANN. tit. 14, §§ 2602–3081 (2011) (however, § 2797 requires a guardian to "manage the estate of his ward . . . in a manner most beneficial to the ward," which could be equated with a "best interest" standard); WYO. STAT. §§ 3-1-101 to -3-1106 (2011).

Of these twenty-eight jurisdictions, fourteen have provisions with language similar to the 1969 UPC provision that grants the guardian of an incapacitated adult the "same powers, rights and duties" as a parent. ALA. CODE § 26-2A-78(a) (LexisNexis 2009); ALASKA STAT. § 13.26.150(c) (2010); DEL. CODE ANN. tit. 12, § 3922(b) (2007); IDAHO CODE ANN. § 15-5-312 (2009); IND. CODE ANN. § 29-3-8-1(a), (b)(1) (West 2010); LA. CODE CIV. PROCEEDINGS ANN.

statutes that refer to “best interest” in the context of guardian decisions, but do not include substituted judgment language.<sup>17</sup> The remaining eighteen jurisdictions include some type of substituted judgment language,<sup>18</sup> fourteen of which also refer to best interest.<sup>19</sup> Given the UGPPA’s dual mandate that guardians make decisions according to both substituted judgment and best interest, our analysis of current state statutes focuses on the fourteen jurisdictions that have adopted both concepts in some manner.

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art. 4566(A) (Supp. 2011) (“Except as otherwise provided by law, the relationship between interdict and curator is the same as that between minor and tutor.”); LA. REV. STAT. ANN. § 9:1032(A) (2008) (“Except as otherwise provided in this Part, the relationship between an interdict and his curator or continuing tutor is the same as that between a minor and his tutor, with respect to the person and property of the interdict.”); ME. REV. STAT. ANN. tit. 18-A, § 5-312(a) (1998); MD. CODE ANN., EST. & TRUSTS § 13-708(b)(1) (LexisNexis 2011); MONT. CODE ANN. § 72-5-321(2) (2011); NEB. REV. STAT. § 30-2628(a) (2008); N.M. STAT. ANN. § 45-5-312(B) (2004); S.C. CODE ANN. § 62-5-312(a) (2010); UTAH CODE ANN. § 75-5-312(2) (1993); WYO. STAT. ANN. § 3-2-201(e) (2011). *See also supra* note 4 and accompanying text.

A few of the jurisdictions with no general surrogate decision-making standard provide a specific standard for health care decisions. *See, e.g.*, ALASKA STAT. § 13.26.150(e)(3) (2010); DEL. CODE ANN. tit. 12, § 3922(b)(3) (2007); ME. REV. STAT. ANN. tit. 18-A, § 5-312(a)(3) (1998); MINN. STAT. ANN. § 524.5-313(c)(4)(i) (West Supp. 2012); NEB. REV. STAT. § 30-2628(a)(3) (2008); N.H. REV. STAT. ANN. § 464-A:25(e) (Supp. 2011); N.M. STAT. ANN. § 45-5-312(B)(3) (2004).

17. *See* MO. ANN. STAT. § 475.120(2) (West 2009); NEV. REV. STAT. ANN. §§ 159.083, 159.079 (LexisNexis 2009 & Supp. 2011); N.C. GEN. STAT. §§ 35A-1241(a)(3), 35A-1251 (2011); OHIO REV. CODE ANN. § 2111.14 (West 2005); R.I. GEN. LAWS § 33-15-29 (1995); WASH. REV. CODE ANN. § 11.92.043(4) (West 2010).

18. *See* ARIZ. REV. STAT. ANN. § 14-5312(A)(11) (2005); COLO. REV. STAT. ANN. § 15-14-314(1) (West 2011); CONN. GEN. STAT. ANN. § 45a-656(b) (West Supp. 2011); D.C. CODE § 21-2047(a)(6) (West Supp. 2011); GA. CODE ANN. § 29-4-22(a) (West 2007); HAW. REV. STAT. ANN. § 560:5-314(a) (LexisNexis 2006); 755 ILL. COMP. STAT. ANN. 5/11a-17(e) (West Supp. 2011); KAN. STAT. ANN. § 59-3075(a)(2) (Supp. 2010); MASS. GEN. LAWS ANN. ch. 190B, § 5-309(a) (West Supp. 2010); MICH. COMP. LAWS ANN. § 700.5314 (West 2002); N.J. STAT. ANN. § 3B:12-57 (West 2007); N.Y. MENTAL HYG. LAW §§ 81.20–.21 (McKinney 2006 & Supp. 2011); 20 PA. CONS. STAT. ANN. § 5521(a) (West 2005); S.D. CODIFIED LAWS § 29A-5-402 (West 2004); V.I. CODE ANN. tit. 15, § 5-314(a) (Supp. 2011); VA. CODE ANN. § 37.2-1020(E) (2005); W. VA. CODE ANN. § 44A-3-1(e) (LexisNexis 2010); WIS. STAT. ANN. § 54.20(1)(b) (West 2008).

19. *See* COLO. REV. STAT. ANN. § 15-14-314(1) (West 2011); D.C. CODE § 21-2047(a)(6) (West Supp. 2010); GA. CODE ANN. § 29-4-22(a) (West 2007); HAW. REV. STAT. ANN. § 560:5-314(a) (2006); 755 ILL. COMP. STAT. ANN. 5/11a-17(e) (West Supp. 2011); KAN. STAT. ANN. § 59-3075(a)(2) (Supp. 2010); MASS. GEN. LAWS ch. 190B, § 5-309(a) (2010); N.J. STAT. ANN. § 3B:12-57 (West 2007); 20 PA. CONS. STAT. ANN. § 5521(a) (West 2005); S.D. CODIFIED LAWS § 29A-5-402 (West 2004); V.I. CODE ANN. tit. 15, § 5-314(a) (Supp. 2011); VA. CODE ANN. § 37.2-1020(E) (2005); W. VA. CODE ANN. § 44A-3-1(e) (LexisNexis 2010); WIS. STAT. ANN. § 54.20(1)(b) (West 2008).

*A. Substituted Judgment/Best Interest Standards*

The fourteen guardianship statutes that contain both substituted judgment and best interest language can be categorized into three types: “dual mandate” jurisdictions, with language similar to the 1997 UGPPA; “hierarchy” jurisdictions, with language that either directs or implies that guardians should first use substituted judgment if possible and otherwise apply best interest; and “no priority” jurisdictions, with statutory language that provides no guidance as to how guardians are to use substituted judgment and best interest. The following further describes and analyzes these statutory approaches.

### 1. Dual Mandate Jurisdictions

Colorado, Georgia, Hawaii, Kansas, and the U.S. Virgin Islands adopted the 1997 UGPPA language that requires a guardian to “consider the expressed desires and personal values of the ward” and “at all times . . . act in the ward’s best interest.”<sup>20</sup> What an incapacitated person wants and what is in the incapacitated person’s best interest are often the same, but the statute does not tell a guardian what to do when a decision reached under substituted judgment conflicts with one made according to best interest. The original comment to Section 314(a) did not address this tension,<sup>21</sup> while a revised comment in the Uniform Laws Annotated states that a guardian should use the traditional best interest decision-making standard “[o]nly when a guardian is not able to ascertain information about the ward’s preferences and desires.”<sup>22</sup> Given that the plain language of the statute does not reflect this sentiment, a guardian risks violating the statute when a decision based on substituted judgment might not meet a best interest test.

### 2. Hierarchy Jurisdictions

Massachusetts, South Dakota, Virginia, and West Virginia have statutory language similar to the 1997 UGPPA, but with one im-

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20. COLO. REV. STAT. ANN. § 15-14-314(1) (West 2011); GA. CODE ANN. § 29-4-22(a) (West 2007); HAW. REV. STAT. ANN. § 560:5-314(a) (LexisNexis 2006); KAN. STAT. ANN. § 59-3075(a)(2) (Supp. 2009); V.I. CODE ANN. tit. 15, § 5-314(a) (Supp. 2010).

21. See UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314 cmt. (1997), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ugppa97.htm>.

22. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314 cmt. (1997), 8A U.L.A. 370 (2003).

portant difference. Rather than require that a guardian act *at all times* in the incapacitated person's best interest, these statutes require a guardian to "consider the expressed desires and personal values of the ward" and to "*otherwise* act in the ward's best interest."<sup>23</sup> It is interesting to note that early drafts of the 1997 UGPPA also provided that, "[a] guardian shall *otherwise* act in the ward's best interest."<sup>24</sup> The phrase "at all times" did not replace "otherwise" until the January 30, 1997 draft of the UGPPA.<sup>25</sup> Although not explicit, the wording of the early drafts of the 1997 UGPPA and of these four state statutes suggests that a guardian is to first consider the expressed desires and personal values of the incapacitated person, but if that is not possible, to "otherwise" make a decision based on best interest.

Two jurisdictions, the District of Columbia and Illinois, state an explicit hierarchy favoring substituted judgment over best interest in their adult guardianship statutes. The D.C. statute provides that the guardian shall "[m]ake decisions on behalf of the ward by conforming as closely as possible to a standard of substituted judgment or, if the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, make the decision on the basis of the ward's best interest."<sup>26</sup> Illinois provides the most detailed directions for using substituted judgment and best interest in a hierarchical fashion:

Decisions made by a guardian on behalf of a ward shall be made in accordance with the following standards for decision making. Decisions made by a guardian on behalf of a ward may be made by conforming as closely as possible to what the ward, if competent, would have done or intended under the

23. MASS. GEN. LAWS ch. 190B, § 5-309(a) (2010); S.D. CODIFIED LAWS § 29A-5-402 (West 2004); VA. CODE ANN. § 37.2-1020 (E) (2005); W. VA. CODE ANN. § 44A-3-1(e) (LexisNexis 2010) (emphasis added).

24. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, DRAFT UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 313(a) (July 12-19, 1996) (annual meeting draft) (emphasis added), available at <http://www.law.upenn.edu/bll/archives/ulc/ugppa/ugppa796.htm>. See also NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, DRAFT UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 313(a) (May 28, 1996 Draft), available at <http://www.law.upenn.edu/bll/archives/ulc/ugppa/28May96.htm>; NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, DRAFT UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 313(a) (Apr. 17, 1996 Draft), available at <http://www.law.upenn.edu/bll/archives/ulc/ugppa/ugppa496.htm>; NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, DRAFT UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 308(a) (Oct. 24, 1995 Draft), available at <http://www.law.upenn.edu/bll/archives/ulc/ugppa/ugppaoct.htm>.

25. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, DRAFT UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 313(a) (Jan. 30, 1997 Draft), available at <http://www.law.upenn.edu/bll/archives/ulc/ugppa/ugppa.htm>.

26. D.C. CODE § 21-2047(a)(6) (Supp. 2011).



circumstances, taking into account evidence that includes, but is not limited to, the ward's personal, philosophical, religious and moral beliefs, and ethical values relative to the decision to be made by the guardian. Where possible, the guardian shall determine how the ward would have made a decision based on the ward's previously expressed preferences, and make decisions in accordance with the preferences of the ward. If the ward's wishes are unknown and remain unknown after reasonable efforts to discern them, the decision shall be made on the basis of the ward's best interests as determined by the guardian. In determining the ward's best interests, the guardian shall weigh the reason for and nature of the proposed action, the benefit or necessity of the action, the possible risks and other consequences of the proposed action, and any available alternatives and their risks, consequences and benefits, and shall take into account any other information, including the views of family and friends, that the guardian believes the ward would have considered if able to act for herself or himself.<sup>27</sup>

### 3. No Priority Jurisdictions

Three states—Pennsylvania, New Jersey, and Wisconsin—use both substituted judgment and best interest language in their statutes, but do not indicate what relative weight guardians are to give substituted judgment and best interest when making decisions.<sup>28</sup> In the context of health care decisions, the Supreme Court of Pennsylvania held that “where there is enough data for the decision maker to ascertain what the patient would have desired, the decision

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27. 755 ILL. COMP. STAT. ANN. 5/11a-17(e) (West Supp. 2011).

28. See 20 PA. CONS. STAT. ANN. § 5521(a) (West 2005) (“It shall be the duty of the guardian of the person to assert the rights and best interests of the incapacitated person. Expressed wishes and preferences of the incapacitated person shall be respected to the greatest possible extent . . . .”); N.J. STAT. ANN. § 3B:12-57 (West 2007) (“[A] guardian of the person of a ward shall exercise authority over matters relating to the rights and best interest of the ward’s personal needs . . . . [A] guardian shall give due regard to the preferences of the ward, if known to the guardian or otherwise ascertainable upon reasonable inquiry.”); 20 PA. CONS. STAT. ANN. § 5521(a) (West 2005) (“It shall be the duty of the guardian of the person to assert the rights and best interests of the incapacitated person. Expressed wishes and preferences of the incapacitated person shall be respected to the greatest possible extent.”); WIS. STAT. ANN. § 54.18(2)(b), .20(1)(b) (West 2008) (requiring a guardian to “[a]dvocate for the ward’s best interests” and consider, consistent with the functional limitations of the incapacitated person, “[t]he ward’s personal preferences and desires with regard to managing his or her activities of daily living”).

maker *must* effectuate substituted judgment.”<sup>29</sup> The Court added that in such circumstances “a best interests analysis may not be employed,”<sup>30</sup> suggesting that substituted judgment and best interest are treated as polar opposites in Pennsylvania. By contrast, the Supreme Court of New Jersey has held that “[t]he substituted-judgment and best-interest tests are not dichotomous, but represent points on a continuum of subjective and objective information leading to a reliable decision that gives as much weight as possible to the right of self-determination.”<sup>31</sup> These examples illustrate the potential difficulty for guardians who must extrapolate guidance from vague statutory language.

## II. THE NEED FOR AN IMPROVED SUBSTITUTED JUDGMENT/BEST INTEREST STANDARD

In the following section, we critique the deficiencies of current statutory decision-making standards. These deficiencies include possible inconsistent outcomes under substituted judgment and best interest, the dilemma posed when substituted judgment leads to an unreasonable outcome, and the unaddressed distinction between what is reasonable and what is best. We then offer an improved decision-making model that places substituted judgment and best interest on a continuum to maximize the role of self-determination in surrogate decisions for incapacitated adults.

### *A. Deficiencies in Current Statutory Decision-Making Standards*

Regardless of what type of substituted judgment/best interest statute governs a guardian’s conduct, none provide adequate guidance for common decision-making problems. For example, the UGPPA “dual mandate” type statute<sup>32</sup> fails to resolve conflict in outcomes when applying both substituted judgment and best interest. A decision that follows the incapacitated person’s previously expressed desires might not meet a best interest test. Although a guardian could claim reliance on the Section 314(a) comment that gives priority to substituted judgment over best interest,<sup>33</sup> we have found no statutory or case law support, outside of the health-care

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29. *In re Fiori*, 673 A.2d 905, 912 n.11 (Pa. 1996).

30. *Id.*

31. *In re M.R.*, 638 A.2d 1274, 1280 (N.J. 1994).

32. See *supra* note 20 and accompanying text.

33. See *supra* note 22 and accompanying text.

decision-making context, for the proposition that a guardian who blindly follows substituted judgment to the detriment of an incapacitated adult will be protected.<sup>34</sup> In fact, one can argue that the UGPPA mandate to “at all times act in the ward’s best interest and exercise reasonable care, diligence, and prudence”<sup>35</sup> constrains a guardian from following substituted judgment to an unreasonable result.

The same difficulty arises under hierarchy statutes<sup>36</sup> and statutes with no specified priority between substituted judgment and best interest.<sup>37</sup> Even the very detailed Illinois statute does not address what a guardian should do if substituted judgment leads to an unreasonable result.<sup>38</sup> Although the goal of substituted judgment is self-determination, the right of an adult with capacity to make a seemingly foolish or irresponsible decision must be distinguished from mandating that the guardian act in an unreasonable manner.

As a policy and practical matter, guardians and other surrogates should not be expected to implement directives or preferences that would be unwise or injurious to the person or property of the incapacitated individual. Guardianship, after all, is designed to protect an incapacitated person who can no longer manage personal and property decisions.<sup>39</sup> In addition, guardians should be protected from mandates that either cause emotional conflict or professional embarrassment because the guardian is forced to act unreasonably, or that might create liability because the guardian is forced to violate fiduciary obligations.<sup>40</sup> Mandating substituted

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34. We are not commenting on end-of-life decision making by guardians, who may be required by state law to carry out the expressed wishes of the incapacitated person without regard to whether the decision is in the person’s best interest. *See, e.g.*, UNIF. HEALTH-CARE DECISIONS ACT § 6(a) (1994), 9 U.L.A. 116 (2005) (“A guardian shall comply with the ward’s individual instructions and may not revoke the ward’s advance health-care directive unless the appointing court expressly so authorizes.”).

35. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 314(a) (1997), 8A U.L.A. 369 (2003) (emphasis added).

36. *See supra* notes 23, 26, and 27 and accompanying text.

37. *See supra* note 28 and accompanying text.

38. *See supra* note 27 and accompanying text.

39. For example, the Pennsylvania guardianship statute states:

[I]t is the purpose of this chapter to promote the general welfare of all citizens by establishing a system which permits incapacitated persons to participate as fully as possible in all decisions which affect them, which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources . . . .

20 PA. CONS. STAT. ANN. § 5502 (West 2005).

40. For analogous protection of agents under powers of attorney, *see* UNIF. POWER OF ATTORNEY ACT (2006), 8B U.L.A. 78 (Supp. 2011) (obligating an agent to “act in accordance with the principal’s *reasonable* expectations to the extent actually known by the agent and, otherwise, in the principal’s best interest”) (emphasis added).

judgment, even when the results are unreasonable, would likely deter both family members and professional guardians from serving as surrogates.

The problem of unreasonable directives under a substituted judgment standard can arise in two contexts. An incapacitated person's preference may have been unreasonable when initially made, or it may become unreasonable because of changed circumstances. The latter may justify rejection of a previously stated preference when it is likely that the incapacitated person would make a different decision if able to comprehend the new circumstances. For example, suppose an incapacitated person had always invested ninety percent of her retirement assets in XYZ Inc., a computer manufacturer for whom she had worked for thirty-five years. She repeatedly told her investment advisor that XYZ stock, which paid a high annual dividend, was the "ideal" stock to own as a retiree. Now suffering from severe dementia, the incapacitated person is dependent for her support on XYZ stock dividends. Unfortunately, over the past two years the company reduced the dividend by seventy percent. The guardian decides to sell half of the XYZ stock and buy ABC Co., which pays a much higher dividend. The guardian correctly assumes that the incapacitated person, if competent, would agree to the sale because XYZ no longer pays the dividend that was the basis for her belief that it was an "ideal" retirement asset.

The question for a guardian becomes: What is reasonable and what degree of changed circumstances justifies rejection of substituted judgment? Of course, the answer is, "it depends." Guardians must determine on a decision-by-decision basis when it is reasonable to apply substituted judgment, and when they should reject or modify it. If the guardian is uncertain as to the wisdom of following the incapacitated person's prior instructions, or if the decision is particularly crucial or controversial, the guardian can petition the court for guidance.<sup>41</sup> In most cases, however, the guardian will independently weigh the circumstances and make a decision.

While common sense may prompt most guardians to temper substituted judgment with reasonableness, current statutory decision-making standards do not explicitly include a reasonableness requirement that would protect guardians and the

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41. See, e.g., *In re Conservatorship of Nagy*, Nos. H035747, H035796, 2011 WL 1330769, at \*3 (Cal. Ct. App. Apr. 2, 2011) (describing a court-appointed temporary conservator's request for permission for the incapacitated person to remain in Great Britain rather than be returned to her California home, which the conservator determined to be in her best interest, despite an explicit statement in her advance health directive that she wanted to live in her California home for as long as possible).

incapacitated persons they serve. If a statute requires that a decision meet the best interest test, however, such a decision would also be reasonable. By definition, to serve an individual's best interest is to act in a manner that promotes the welfare and well-being of the individual.<sup>42</sup>

Ironically, while dual mandate-type statutes like the UGPPA may deter unreasonable decisions, they also deprive incapacitated persons of the right to substituted judgments that produce reasonable outcomes. Some outcomes may be reasonable or "good" but not optimum, and therefore might not satisfy a best interest test. Consider a farmer who is the fourth generation to occupy a family heritage farm. The farmer has left specific instructions that the farm should be sold to his son when the farmer can no longer live there. Now that the farmer's health has deteriorated, his guardian must decide whether to sell the farm to the son on an installment contract at fair market value, or to continue to lease the farm, which would produce a higher monthly income. If the statute permits substituted judgments that are reasonable, the guardian can sell the farm to the son; if substituted judgment is permitted only when it is also in the farmer's best interest, the guardian must instead continue to lease the property.<sup>43</sup>

### *B. The Substituted Judgment-Best Interest Continuum Model*

Although substituted judgment and best interest are arguably opposite standards for surrogate decision making,<sup>44</sup> we believe the better model places these standards on a continuum.<sup>45</sup> In our

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42. See ALAN MEISEL & KATHY L. CERMINARA, *THE RIGHT TO DIE, THE LAW OF END-OF-LIFE DECISIONMAKING* 4–11 (3d ed. supp. 2011).

43. See, e.g., *In re Guardianship and Conservatorship of Jordan*, 616 N.W.2d 553, 560 (Iowa 2000) (holding that, although proceeds from the sale of the ward's farm would pay the ward's nursing home bill and relieve the ward of the costs of maintaining the property, such sale was not in the ward's best interest because the costs of maintaining the property were minimal and the proceeds of the installment sale provided less income than did the rent that the ward had previously received).

44. See, e.g., Casasanto et al., *supra* note 6 (discussing the rationale for each standard); see also Ursula K. Braun et al., *Reconceptualizing the Experience of Surrogate Decision Making: Reports vs Genuine Decisions*, 7 ANNALS FAM. MED. 249, 249–50 (2009) (noting because of the "high evidentiary standards" which must be met for substituted judgment, surrogate decisions made under this standard are really "reports" rather than "genuine decisions"); Pam R. Sailors, *Autonomy, Benevolence, and Alzheimer's Disease*, 10 CAMBRIDGE Q. HEALTHCARE ETHICS 184 (2001) (arguing that substituted judgment should not be used unreflectively for incapacitated persons because preferences stated when competent may not best serve the incapacitated successor self).

45. See *In re M.R.*, 638 A.2d 1274, 1280 (N.J. 1994) (stating that the substituted judgment and best interest standards represent points on a continuum rather than dichotomous

research for the National Guardianship Summit, we synthesized the spectrum of viewpoints about substituted judgment and best interest into four decision-making standards: Strict Substituted Judgment, Expanded Substituted Judgment, Expanded Best Interest, and Strict Best Interest.<sup>46</sup> We propose a model of decision-making that treats these standards as points on a continuum which, when used to guide guardians, maximizes the self-determination interests of incapacitated adults. The following definitions explain the basis for decisions under each standard, and the diagram illustrates how the standards relate to one another on the continuum. A general description of the continuum decision-making process is provided, supplemented by a discussion of factors that influence the application of each standard.

### 1. Brief Definitions of Decision-Making Standards

- *Strict Substituted Judgment:*

Guardians should base their decisions on the incapacitated person's prior specific directions, expressed desires, and current competent opinions.

- *Expanded Substituted Judgment:*

Guardians may base their decisions on the incapacitated person's prior general statements, actions, values, and preferences.

- *Expanded Best Interest:*

Guardians may base their decisions on the benefits and burdens for the incapacitated person, as discerned from available information, including the views of professionals and others with sufficient interest in the incapacitated person's welfare. Decisions may also include consideration of consequences for others that a reasonable person in the incapacitated person's circumstances would consider.

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tests). See also Daniel P. Sulmasy & Lois Snyder, *Substituted Interests and Best Judgments*, 304 J. AM. MED. ASS'N 1946, 1946 (2010) (urging that where a patient's preferences are unknown, surrogates should use a "substituted interests" approach, based on a patient's "authentic values and real interests," to reach a "best judgment").

46. See Whitton & Frolik, *supra* note 15, for examples illustrating the application of these standards.

- *Strict Best Interest.*

Guardians should base their decisions solely on the benefits for, and burdens on, the incapacitated person as discerned from available information, including the views of professionals.

## 2. Illustration and Description of Substituted Judgment-Best Interest Continuum

Standard	Strict SJ	Expanded SJ	Expanded BI	Strict BI
Basis For Decision	IP's prior specific directions, expressed desires and current opinions	IP's prior general statements, actions, values and preferences	Benefits and burdens for IP based on available information, including views of professionals and others with sufficient interest in IP's welfare; may also include consideration of consequences for others that a reasonable person in IP's circumstances would consider	Benefits and burdens solely for IP based on available information, including views of professionals
When Not Applicable	None are known  •Unreasonable result	None are known  •Unreasonable result	No persons with sufficient interest in IP's welfare  •Unreasonable result	
SJ=substituted judgement BI=best interest IP=incapacitated person				

Decision making starts as far to the left on the continuum as possible. If the guardian knows the incapacitated person's prior specific directions, expressed desires, or current competent opinions, Strict Substituted Judgment should be used, provided that it does not produce an unreasonable result. If there are no known directions, desires, or opinions, or if following such information would produce an unreasonable decision, the guardian should attempt to make the decision according to Expanded Substituted Judgment—relying upon the incapacitated person's general statements, actions, values, and preferences to discern what the incapacitated person likely would have wanted in the circumstances. Again, if this information is not available or would lead to an unreasonable result, the guardian moves to the next standard—Expanded Best Interest—to assess the benefits and burdens of the possible alternatives, considering, when available, the views of professionals and others who have demonstrated a sufficient interest in the incapacitated person's welfare.

Under Expanded Best Interest, the guardian may also consider the consequences of the decision for persons other than the incapacitated individual if such consequences are what a reasonable person in the incapacitated person's circumstances would likely consider. If there are no persons available with a sufficient interest in the incapacitated person's welfare, or if their views would lead to an unreasonable result, the guardian is left with only Strict Best Interest to guide the decision. The goal of decision making across the continuum is to give the greatest preference possible to the directions, views, and values of the incapacitated person and, where such information is not available, to consider the opinions of those who know the person best. We believe that this progression across the continuum results in decisions that most closely approximate what the incapacitated person would want. Guardians should resort to the impersonal Strict Best Interest standard only in the rare instances when they have no information about the incapacitated person's preferences or values, and no contact with family or friends who could provide an authentic sense of who the person was before incapacity. The following discussion provides further explanation of decision making across the continuum.

#### a. Strict Substituted Judgment

To apply Strict Substituted Judgment, the guardian must have actual knowledge of what the incapacitated person would have done in the present circumstances. For example, suppose that the incapacitated person owns a sports car, but now suffers from severe dementia. When the dementia was mild, the incapacitated person had told her guardian that the car should be sold if she became too incapacitated to drive. Although the incapacitated person can no longer drive, her grandson suggests that the guardian keep the car and permit him to take his grandmother for rides in the car. Applying Strict Substituted Judgment, the guardian must deny the request and sell the car because that is what the incapacitated person wanted.

Unfortunately, Strict Substituted Judgment has limited application because in most cases the incapacitated person will not have made an explicit pronouncement about the specific decision facing the guardian. If the guardian is limited to Strict Substituted Judgment, often the guardian cannot implement what the guardian suspects to be the wishes of the incapacitated person. For example, suppose that five years ago, the incapacitated person made a gift to his church building fund of \$5,000. Thereafter, the church suffered



a fire and now requests the guardian to make a further donation of \$5,000 from the large estate of the incapacitated person. Under Strict Substituted Judgment, the guardian could not make the gift without evidence of the incapacitated person's specific intent to make another donation, even though the guardian strongly suspects that the incapacitated person would want to assist his church. Nevertheless, lacking certainty as to what the incapacitated person would have done, the guardian cannot apply Strict Substituted Judgment.

### b. Expanded Substituted Judgment

The answer to the limits of Strict Substituted Judgment is an expanded form of substituted judgment that relies on information about the incapacitated person's prior general statements, actions, values, and preferences. Such information may be considered by a guardian in an attempt to understand what the incapacitated person would have done if facing the same circumstances that confront the guardian. Under Expanded Substituted Judgment, the guardian does not have definitive information about the incapacitated person's desires with respect to the particular issue under consideration, yet the guardian can make a decision that represents a best estimate of what the incapacitated person would have done.<sup>47</sup>

Expanded Substituted Judgment does not afford the degree of certainty that Strict Substituted Judgment does. The guardian cannot be sure that a decision is the same as what the incapacitated person's would have been, but by permitting the guardian to make reasonable inferences, the guardian can make a decision that reflects the values, preferences, and biases of the incapacitated person. For example, suppose the guardian is faced with whether to keep the incapacitated person in home care at great cost, or move the incapacitated person to an assisted living facility that will cost half as much. If, in years past, the incapacitated person had admitted her mother to an assisted living facility and had told her friends that it was a more practical response to the mother's care needs, the guardian could conclude that the incapacitated person

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47. See *Kelly v. McNeel*, 250 P.3d 1105, 1114 (Wyo. 2011). Ascertaining what the incapacitated person would have done assumes that the individual's preferences were freely acquired. Substituted judgment is not appropriate if the individual's preferences were the result of undue influence. See *id.* Implementing such preferences would not be acting in that person's best interest. See *id.*

would approve of a move to assisted living, even though the incapacitated person never expressed a specific opinion about it.

Decisions made under Expanded Substituted Judgment, like those under Strict Substituted Judgment, must be reasonable. If following the incapacitated person's preferences would lead to an unreasonable action, the guardian must either reevaluate what the guardian believes to be the incapacitated person's preferences, or reject application of Expanded Substituted Judgment and apply a best interest standard.

At times, evidence of what the incapacitated person would have done is too thin to support even Expanded Substituted Judgment. The guardian should not apply Expanded Substituted Judgment if a reasonable person would conclude that there is insufficient information from which to determine what the incapacitated person would want. In such a case, the guardian will be forced to apply a best interest standard. But even when the lack of information about the incapacitated person's preferences bars the use of Expanded Substituted Judgment, the guardian may have some knowledge about the incapacitated person that can be incorporated into the decision-making process. A guardian should use this knowledge, based on direct experience with the incapacitated person or on information received from others, to modify the best interest standard from a purely objective one to one that accounts for the unique qualities of the incapacitated individual.<sup>48</sup>

### c. Expanded Best Interest

Like substituted judgment, best interest can take a strict or expanded form. Under Strict Best Interest, the guardian should make decisions based solely on what best promotes the well-being of the incapacitated person. Strict Best Interest unfortunately ignores the legitimate interests of third parties that the incapacitated person, if competent, would consider. Most incapacitated persons have others they care about, and if a guardian has instructions about what the incapacitated person wants for those individuals, the guardian can incorporate such instructions into substituted judgment. But when this is not possible, the incapacitated person's concerns for third parties play no role in the application of Strict Best Interest. The solution is for a guardian to employ an expanded version of best interest.

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48. See Sulmasy & Snyder, *supra* note 45.

Expanded Best Interest permits the guardian to consider the consequences for others whose interests and well-being would be perceived of significance to the incapacitated person under a reasonable person standard.<sup>49</sup> Most incapacitated persons have family and friends, and belong to social and religious organizations. Expanded Best Interest assumes that when making decisions an incapacitated person would take those persons and organizations into consideration. For example, an aging parent might deliberately live frugally in order to increase the value of the estate that will be passed on to his children at his death. Under Strict Best Interest, the interest of the children is irrelevant because the guardian must act solely on the basis of what is best for the incapacitated person. Under Expanded Best Interest, the guardian could assume that the incapacitated person would have a concern for the well-being of his children and so would have preferred to assist a child financially even at the cost of modest reduction in his own standard of living. If, for example, the incapacitated person had an adult unemployed child who wanted to return to school to learn an employable skill, the guardian could legitimately use some of the incapacitated person's assets to pay the cost of the child's tuition.

Expanded Best Interest does raise questions about whose interests should be considered and the degree to which the guardian should assist those individuals. As with Expanded Substituted Judgment, if the guardian is uncertain as to the propriety of a proposed course of action, the guardian can petition the court for guidance. Courts in turn must take care that Expanded Best Interest does not cross over into exploitation or abuse of the incapacitated person—a risk that exists no matter which decision-making standard is used.

#### d. Strict Best Interest

When no knowledge about an incapacitated person is available to inform even an Expanded Best Interest analysis, the guardian is left with applying Strict Best Interest. The guardian is not concerned with what the incapacitated person would do, but does what a reasonable person would do in light of the particular circumstances

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49. See, e.g., *In re Whitbread* (1816), 35 Eng. Rep. 878 (Ch.). Although often cited as the case that first recognized "substituted judgment," here the court made a decision for an incapacitated person in circumstances where there was no evidence of what the incapacitated person would have wanted. See *id.* at 878–79. The court approved an increase in the allowance for the incapacitated person's niece, opining that someone in the position of the incapacitated person would likely prefer that outcome to the embarrassment caused by the niece's poverty. See *id.*

and the relative benefits and burdens of the available options.<sup>50</sup> The guiding principle for the guardian is to behave reasonably, with the understanding that different guardians might reach different conclusions about the preferred course of action. Moreover, the guardian may take into consideration the views and advice of others,<sup>51</sup> provided the guardian is guided by doing what is best for the incapacitated person. On our Substituted Judgment-Best Interest Continuum, resort to Strict Best Interest will not be necessary unless the individual subject to guardianship is completely incapacitated and the guardian is a non-family member—professional or volunteer—who has no knowledge about the unique attributes of the incapacitated person, and no sources from which such information can be gathered.<sup>52</sup>

### III. PROPOSAL TO REFORM THE UGPPA SUBSTITUTED JUDGMENT/BEST INTEREST STANDARD

Based on our Substituted Judgment-Best Interest Continuum for guardian decisions, we propose the following reform to Section 314(a) of the 1997 UGPPA:<sup>53</sup>

#### SECTION 314(a):

Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall *promote the self-determination of the ward and* exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. *A guardian shall at all times exercise reasonable care, diligence, and prudence and, when making decisions:*

- (1) *act in accordance with the ward's reasonable current or prior directions, expressed desires, and opinions to the*

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50. Loretta M. Kopelman, *The Best Interests Standard for Incompetent or Incapacitated Persons of All Ages*, 35 J.L. MED. & ETHICS 187, 188 (2007) (best interest "guides decision-makers to pick from among options that reasonable persons of good will would consider acceptable").

51. See, e.g., 755 ILL. COMP. STAT. ANN. 5/11a-17(e) (West Supp. 2011).

52. See Naomi Karp & Erica Wood, *Incapacitated and Alone: Healthcare Decision Making for Unbefriended Older People*, 31 HUM. RTS. 20, 22 (2004) (urging that even for the unbefriended, long-term care facilities and staff should play a greater role in "investigating and conveying resident values and preferences" and should develop procedures for "collecting and using resident histories and values information").

53. Proposed language is shown in italics.

- extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,*
- (2) *act in accordance with the ward's reasonable prior general statements, actions, values, and preferences to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,*
  - (3) *act in accordance with the ward's best interest as determined from reasonable information received from professionals and persons who demonstrate sufficient interest in the ward's welfare, which determination may include consideration of consequences for others that a reasonable person in the ward's circumstances would consider.*

This revision addresses current deficiencies in adult guardianship decision-making statutes by providing that:

- 1) self-determination is the paramount surrogate decision-making objective;
- 2) decisions based on substituted judgment should be reasonable;
- 3) guardians should attempt to ascertain information upon which to base a substituted judgment;
- 4) guardians should attempt to personalize even decisions based on best interest by seeking information from professionals and persons who have an interest in the welfare of the incapacitated person; and
- 5) guardians may consider consequences to persons other than the incapacitated person when a reasonable person in the incapacitated person's circumstances would likely do so.

This proposed revision to Section 314(a) of the UGPPA improves guidance to guardians and clarifies that the goal of self-determination trumps best interest when surrogate decisions are made for incapacitated adults. The prioritization of substituted judgment over best interest is consistent with policies embodied in the Uniform Health-Care Decisions Act<sup>54</sup> and the Uniform Power of Attorney Act.<sup>55</sup>

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54. See *supra* note 12.

55. See *supra* note 13.

The Uniform Health-Care Decisions Act contains three surrogate decision-making standards—one for health care agents,<sup>56</sup> one for health care surrogates,<sup>57</sup> and one for guardians.<sup>58</sup> Each decision-making standard within the Uniform Health-Care Decisions Act mandates that the individual instructions of an incapacitated person must be followed. Guardians must “comply with the ward’s individual instructions and may not revoke the ward’s advance directive unless the appointing court expressly so authorizes.”<sup>59</sup> The provisions for health care agents and surrogates mandate that decisions be made in accordance with “individual instructions, if any, and other wishes to the extent known,” and otherwise in accordance with a determination of best interest, which must include consideration of the incapacitated person’s values to the extent known.<sup>60</sup> Thus, the decision-making standards within the Uniform Health-Care Decisions Act are similar to the Substituted Judgment-Best Interest Continuum, requiring that consideration move from individual instructions to known wishes, and then to best interest informed by the incapacitated person’s values.<sup>61</sup>

Likewise, the Uniform Power of Attorney Act requires that an agent “act in accordance with the principal’s reasonable expectations to the extent actually known by the agent and, otherwise, in the principal’s best interest.”<sup>62</sup> In theory, a principal who pre-plans for incapacity by executing a power of attorney may be more likely to communicate expectations and instructions than an adult who later requires guardianship. In practice, it is doubtful many agents receive a statement of expectations to guide the decisions that they

56. See UNIF. HEALTH-CARE DECISIONS ACT § 2(e) (1994), 9 U.L.A. pt. 1B, at 94 (2005).

57. See § 5(f), 9 U.L.A. pt. 1B, at 111 (2005).

58. See § 6(a), 9 U.L.A. pt. 1B, at 116 (2005).

59. *Id.*

60. See *supra* notes 56 & 57.

61. Given the unique nature of health care decisions, however, the Uniform Health-Care Decisions Act does not require that substituted judgment be reasonable. In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 279 n.7 (1990), the Supreme Court held that an individual has a constitutional right, grounded in the Fourteenth Amendment’s liberty interest, to refuse treatment. According to the Court, the “principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.” *Id.* at 278. Since *Cruzan*, lower courts have increasingly taken the position that a competent individual has an almost absolute right to refuse treatment. See cases listed in MEISEL & CIMINARA, *supra* note 42, at 2–15 & n.63. When the patient has provided sufficient evidence of treatment preferences in case of incapacity, courts almost always permit the surrogate decision maker to carry out those desires even if doing so will result in the patient’s death. See LAWRENCE A. FROLIK & MELISSA C. BROWN, ADVISING THE ELDERLY OR DISABLED CLIENT 23–24 (2d ed. supp. 2011). The judicial support for a surrogate’s right to refuse treatment for the patient can be traced to *In re Quinlan*, 335 A.2d 647 (N.J. 1976).

62. UNIF. POWER OF ATTORNEY ACT § 114(a) (2006), 8B U.L.A. 78 (Supp. 2011).

must make for an incapacitated principal. The Substituted Judgment-Best Interest Continuum, while designed with guardianship in mind, can be applied as well to help agents reach a decision that approximates what the incapacitated principal would have wanted. From a policy perspective, it makes sense to harmonize the surrogate decision-making standards within the UPC, and from a practical perspective, surrogates need more guidance in carrying out their decision-making responsibilities.

### CONCLUSION

The UPC, through the 1997 UGPPA, made a significant contribution to the recognition of substituted judgment as the preferred decision-making standard for guardian decisions on behalf of incapacitated adults. The UGPPA substituted judgment/best interest standard, while innovative at the time, contains a number of deficiencies, as do state guardianship statutes that contain substituted judgment provisions. Based on the evolution of surrogate decision-making standards, we have proposed a new continuum model to clarify how surrogates can make decisions that maximize self-determination interests. The goal of decision making across the continuum is to honor the reasonable directions, views, and values of the incapacitated person when such information is available and, when unavailable, to consider the opinions of the individuals who know the incapacitated person best. The model encourages surrogate decisions that respect, to the greatest degree possible, the individuality of each incapacitated adult. We believe that the UGPPA decision-making standard should be reformed not only to address deficiencies and harmonize surrogate decision-making standards within the UPC, but also to provide more effective guidance to guardians and to states that are undertaking guardianship law reform efforts.